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In the

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-739

GENERAL MOTORS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTAL MEMORANDUM OF PETITIONER

ERWIN N. GRISWOLD
1100 Connecticut Avenue
Washington, D. C. 20036

GEORGE J. MOSCARINO
HUGH CALKINS
1700 Union Commerce Bldg.
Cleveland, Ohio 44115

JULIUS L. RUSSU
General Motors Building
Detroit, Michigan 48202

Of Counsel:

JONES, DAY, REAVIS
& POGUE

OTIS M. SMITH
General Counsel
General Motors Corporation

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SUPPLEMENTAL MEMORANDUM OF PETITIONER

This Supplemental Memorandum is submitted to bring to the Court's attention two recent decisions of the United States Courts of Appeals for the First and Seventh Circuits published subsequent to the filing of the Petition in this case. These decisions make clear the conflicts which exist

among the courts of appeals as to both of the procedural issues presented in GM's Petition.[1]

I. THE SEVENTH CIRCUIT DECISION CONFLICTS WITH THE SIXTH CIRCUIT'S DECISION IN THIS CASE BOTH AS TO APPEALABILITY UNDER § 1291 AND AS TO WHETHER A GRAND JURY IS A CIVIL OR A CRIMINAL PROCEEDING.

The Seventh Circuit's decision in *In re Special February 1977 Grand Jury*, 581 F.2d 1262 (7th Cir. 1978) (reprinted as Appendix I hereto), conflicts with the decision of the Sixth Circuit in this case as to the jurisdiction of the federal appellate courts.

One issue stated in GM's Petition is "whether an order denying a motion to disqualify counsel in a grand jury proceeding may be appealed under 28 U.S.C. § 1291." The Sixth Circuit majority held that such an order cannot be appealed pursuant to § 1291. The Seventh Circuit ruled to the contrary:

> We conclude therefore that the denial of a disqualification motion in a grand jury setting falls within the "collateral order" exception of *Cohen*, and that the Government has standing to appeal such a denial. [App. I-4; 581 F.2d at 1264].

The Sixth Circuit majority below reasoned that the disqualification issue can be raised after conviction and "is not an issue which is 'destroyed' if not 'vindicated before trial.'" [GM Cert. Pet. at B-7]. The Seventh Circuit disagreed, stating that "such a denial must be viewed as a final order that implicates important rights which would be irretrievably lost if review were denied." [App. I-3; 581 F.2d at 1264].

The government argued conflicting positions in these two cases: it claimed in the Seventh Circuit that orders denying disqualification in a grand jury setting are appealable,[2] while it argued the opposite position in the Sixth Circuit. There is no way to reconcile these two cases except on the basis that the government always wins.

The government's appeal in the Seventh Circuit is also inconsistent with its position in the Sixth Circuit, adopted by the majority of that Court, that a grand jury is a criminal proceeding for the purpose of § 1292(b). The government's brief in the Seventh Circuit argued that the decision denying its motion to disqualify "is not one which will merge in a final judgment, as there is no criminal action pending before the District Court."[3] The Seventh Circuit adopted this language in its opinion. [App. I-3]. Furthermore, by taking appeals to the Seventh and

[1] A decision of the Seventh Circuit on October 4, 1978 describes the substantive issue presented in GM's Petition as "an issue of considerable importance to the administration of criminal justice" which "has not yet been conclusively resolved." *In re Perlin*, ... F.2d ..... (7th Cir. 1978), slip op. p. 2. Similarly, a recent District Court decision states that "*GM* presents, in sharp relief, a conflict between two competing principles fundamental to our notion of criminal justice." *United States v. Dondich*, [1978] FED. SEC. L. REP. (CCH) ¶ 96,547 (C.D. Cal. 1978).

[2] The government also recently appealed from an order denying a motion to disqualify an attorney in a grand jury proceeding in *In re Grand Jury Investigation, Appeal of United States*, 576 F.2d 1071 (3d Cir. 1978) (*en banc*), *cert. denied*, 47 U.S.L.W. 3310 (U.S., Nov. 7, 1978), and asserted to the Third Circuit that "[T]his Court has jurisdiction over this appeal under 28 United States Code Section 1291" (Brief for Appellant at 1). However, since the district court had held that the government's motion was not yet ripe for judicial intervention, 436 F. Supp. 823, the Third Circuit apparently dismissed the government's appeal for lack of finality, although accepting an appeal by one of the grand jury witnesses whose counsel had been disqualified by the same order.

[3] Brief for the United States at 18. The relevant portion of the government's brief in the Seventh Circuit is reprinted herein as Appendix II. The quoted language appears at App. II-4.

Third[4] Circuits under § 1291, the government concedes that a grand jury investigation is not a "criminal proceeding" for the purpose of applying appellate jurisdiction statutes. The government can only appeal from an order in a "criminal proceeding" pursuant to 18 U.S.C. § 3731. See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 568 (1977); *United States v. Wilson*, 420 U.S. 332, 336 (1975); *Will v. United States*, 389 U.S. 90, 96 (1967); *United States v. Sanges*, 144 U.S. 310, 319 (1892). Section 3731 allows the government to appeal from "a decision or order of a district courts [sic] suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding. . ." Since the government can obtain appellate review of orders in grand jury proceedings not involving suppression of evidence or return of seized property, the government must admit that a grand jury investigation is not a "criminal proceeding" for the purpose of applying the language of the appellate review statutes.

From this simple analysis it is clear that both the government and the Seventh Circuit treated the appeal as a civil matter, while in the present case both the government and the Sixth Circuit treated it as a criminal proceeding.

II. THE FIRST CIRCUIT DECISION HOLDING THAT ORDERS DISQUALIFYING COUNSEL IN GRAND JURY PROCEEDINGS ARE NOT APPEALABLE UNDER § 1291 CONFLICTS WITH DECISIONS OF THREE OTHER CIRCUITS THAT SUCH ORDERS ARE APPEALABLE.

In arguing that orders denying disqualification of counsel in a grand jury proceeding are appealable, GM has relied extensively on the decisions of the Third, Fourth,

[4] *See* note 2, *supra.*

and D.C. Circuits holding that orders disqualifying counsel in a grand jury proceeding are appealable under § 1291. *In re Investigation Before February, 1977, Lynchburg Grand Jury*, 563 F.2d 652 (4th Cir. 1977), *Matter of Grand Jury Empaneled January 21, 1975*, 536 F.2d 1009 (3d Cir. 1976); *In re Investigation Before April 1975 Grand Jury*, 531 F.2d 600 (D.C. Cir. 1976). Two other circuits have also decided such appeals without even questioning their appellate jurisdiction. *In re Taylor*, 567 F.2d 1183 (2d Cir. 1977); *In re Gopman*, 531 F.2d 262 (5th Cir. 1976).

In spite of this wealth of authority from five circuits, the First Circuit recently dismissed *sua sponte* an appeal from an order disqualifying counsel in a grand jury proceeding in *In re Benjamin*, 582 F.2d 121 (1st Cir. 1978). The First Circuit specifically disapproved the decisions of the Third, Fourth and D.C. Circuits and held that, notwithstanding the settled law on the appealability of orders respecting disqualification motions, the decisions of this Court in *Cobbledick v. United States*, 309 U.S. 323 (1940), and *United States v. Ryan*, 402 U.S. 530 (1971), bar appeals of *any* orders in grand jury proceedings.

It should be noted that the government did not contest the First Circuit's jurisdiction in *Benjamin*, a failure which is inconsistent with the government's challenge to the Sixth Circuit's jurisdiction in this case.

CONCLUSION

The circuits are in hopeless disagreement as to their jurisdiction to hear appeals from orders respecting motions to disqualifying counsel in a grand jury setting, and this Court should resolve this jurisdictional conflict in view of the accelerating activity in the circuits on this question.

Jurisdiction does not and should not depend upon the identity of the party which seeks to appeal. Nor should jurisdiction depend upon which circuit considers the appeal. This Court should grant a writ of certiorari to resolve these conflicts between the circuits.

Respectfully submitted,

Of Counsel:

JONES, DAY, REAVIS & POGUE

OTIS M. SMITH
General Counsel
General Motors Corporation

ERWIN N. GRISWOLD
1100 Connecticut Avenue
Washington, D. C. 20036
452-5880

GEORGE J. MOSCARINO
HUGH CALKINS
1700 Union Commerce Building
Cleveland, Ohio 44115
(216) 696-3939

JULIUS L. RUSSU
Senior Attorney
General Motors Corporation
General Motors Building
Detroit, Michigan 48202
(313) 556-4041

Appendix I

In The

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 78-1520

In the Matter of THE SPECIAL FEBRUARY 1977 GRAND JURY.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Appeal of UNITED STATES OF AMERICA	No. 77-GJ-466
	James B. Parsons, *Chief Judge*

ARGUED JUNE 12, 1978 — DECIDED AUGUST 11, 1978

Before FAIRCHILD, *Chief Judge*, SPRECHER and BAUER, *Circuit Judges.*

BAUER, *Circuit Judge.* At issue in this appeal is whether the district court abused its discretion in denying the Government's motion to disqualify Robert L. Tucker from representing multiple witnesses in a federal grand jury proceeding. For the reasons noted below we affirm.

I.

At the outset we are confronted with the question of whether this Court has jurisdiction to review an order of the district court denying a motion to disqualify an attorney in the course of a federal grand jury proceeding. We begin by noting that such an order is appealable only if it falls within the "collateral order" exception to the final judgment rule of 28 U.S.C. § 1291. As articulated by the Supreme Court, the "collateral order" doctrine applies to a small class of decisions which

> "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 (1949).

This court and several other circuits have applied the "collateral order" doctrine to orders granting and denying disqualification motions in the context of a civil trial. *See*, e. g., *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602 (8th Cir. 1977); *Schloetter v. Railoc of Ind., Inc.*, 546 F.2d 706 (7th Cir. 1976); *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 496 F.2d 800 (2d Cir. 1974); *Greene v. Singer Co.*, 509 F.2d 750 (3d Cir. 1971), *cert. denied*, 409 U.S. 848, 93 S.Ct. 54, 34 L.Ed.2d 89 (1972); *Tomlinson v. Florida Iron & Metal Co.*, 291 F.2d 333 (5th Cir. 1961). Moreover, at least four circuits have held that orders *granting* a disqualification motion in a grand jury setting are appealable under *Cohen*. *See In re Investigation Before the February, 1977 Lynchburg Grand Jury*, 563 F.2d 652 (4th Cir. 1977); *In re Gopman*, 531 F.2d 262 (5th Cir. 1976); *In re Investigation Before the April 1975 Grand Jury*, 174 U.S.App.D.C. 268, 531 F.2d 600 (1976); *In the Matter of the Grand Jury Empaneled January 21, 1975*, 536

F.2d 1009 (3d Cir. 1976). It appears, however, that no circuit has yet decided whether an order *denying* a disqualification motion in a *grand jury setting* falls within the "collateral order" exception.

It is our conclusion that such a denial must be viewed as a final order that implicates important rights which would be irretrievably lost if review were denied. *In re Investigation Before the February, 1977 Lynchburg Grand Jury*, 563 F.2d 652, 655 (4th Cir. 1977). We note first in this connection that such an order would not merge in a final judgment, since there is no criminal action pending before the district court. Second, as to the rights at stake, it seems clear that a conflict of interests such as the one alleged in this case poses a substantial threat to the "public's right to the proper functioning of a grand jury investigation." *In re Lynchburg Grand Jury, supra* at 655. For one thing, such a conflict represents a serious ethical impropriety, and thus impugns the integrity of the entire proceeding. Perhaps more importantly, however, an attorney who represents multiple grand jury witnesses with conflicting interests threatens to impede the grand jury's investigative function by depriving it of the full testimony of witnesses—that is, by counseling some clients to pursue a course of action that does not adversely impact on the conflicting interests of others. In this sense, then, the conflict of interests "frustrate[s] the public's interest in the fair and expeditious administration of the criminal laws." *United States v. Dionisio*, 410 U.S. 1, 17, 93 S.Ct. 764, 773, 35 L.Ed.2d 67 (1972).

While acknowledging that the public's right to the proper functioning of a grand jury is implicated by a conflict of interests situation, the appellee insists that the Government does not have standing to vindicate that right on appeal. We cannot agree. In the first place, it seems clear that the United States Attorney has standing to call

the district court's attention to a possible ethical violation concerning the grand jury proceeding:

> "When an attorney discovers a possible ethical violation concerning a matter before a court, he is not only authorized but is in fact obligated to bring the problem to that court's attention. Nor is there any reason why that duty should not operate when, as in the present case, a lawyer is directing the court's attention to the conduct of opposing counsel. In fact, a lawyer's adversary will often be in the best position to discover unethical behavior. . . . Appellant has failed to persuade us that different rules of standing and jurisdiction should apply when criminal proceedings are in the grand jury stage."

In re Gopman, 531 F.2d 262, 265-66 (5th Cir. 1976) [citations omitted]. In our view, this same rationale operates to confer standing on the Government to appeal the district court's denial of the disqualification motion. Moreover, quite apart from these ethical considerations, the Government has a substantial interest in removing impediments to the grand jury's investigative function. The United States Attorney, after all, is directed by statute to "prosecute for all offenses against the United States" (28 U.S.C. § 547(1)), and, under the Fifth Amendment, any such prosecution must begin with "a presentment or indictment of a Grand Jury."

We conclude therefore that the denial of a disqualification motion in a grand jury setting falls within the "collateral order" exception of *Cohen*, and that the Government has standing to appeal such a denial.

II.

In addressing the merits of the appeal, we begin by noting our agreement with the Government's position that, in the context of a grand jury proceeding, a disqualification motion *may* be granted without proof of the existence of an

actual conflict of interest. That is, when the possibility of a conflict becomes great enough, the court may, in the proper exercise of its discretion, move to " 'nip any potential conflict of interest in the bud' " by granting a disqualification motion. *In re Gopman, supra* at 266.

The question before us in this appeal, however, is whether the lower court abused its discretion by denying the disqualification motion. In this connection, the Government invites us to adopt what amounts to a *per se* rule — namely, the existence of a *potential* conflict of interests *requires* the district court to grant the disqualification motion. We decline to adopt such an inflexible approach. Rather, we hold that the lower court's exercise of discretion in denying a disqualification motion will not be disturbed on appeal absent a clear showing of either an actual conflict of interests or a grave danger of such a conflict which would impede the proper functioning of the grand jury.

On the record before us, we are not persuaded that such a showing has been made in this case. It is true, as the Government points out, that two of Tucker's clients have been immunized. But, significantly, at the hearing that was held on the disqualification motion, there was no testimony or evidence to indicate that these immunized witnesses can incriminate Tucker's other clients. As an added precaution, but not necessary to the instant determination, the district judge apprised all of the witnesses of the potential for a conflict of interests and each indicated a desire to proceed with joint representation. In this light, we cannot agree that the lower court abused its discretion in denying the disqualification motion. The judgment of the lower court is therefore

AFFIRMED.

FAIRCHILD, *Chief Judge*, concurring in part, dissenting in part. Once the merits are reached, I agree with Part II of the opinion. Respectfully, however, I would dismiss the appeal and not reach the merits. I do not agree that the denial of the government's motion is appealable by the government. In my opinion the government has not shown a sufficient interest, separate from the interest of the district court itself.

In a more typical disqualification motion, the movant is attempting to protect himself from an unfair advantage through his adversary's use of counsel who has a conflicting professional duty to movant. If the motion be granted, the adversary is denied the attorney of his choice and the attorney is subjected to a restriction on his practice. If the motion be denied, the movant is subjected to the supposed disadvantage. In any case, an interest of some substance is affected, and if the court's decision be erroneous, the injury cannot be adequately remedied on appeal from the ultimate judgment. Thus the order arguably has *Cohen* finality, and is appealable.

The case before us seems to me to be different. The primary responsibility for conducting the grand jury rests with the court, not the government, and the guardian of the public interest in proper professional conduct is, again, the court and not the government. Surely the government may alert the court to what it considers to be unethical professional conduct, and courts often call upon prosecutors for assistance in presenting such matters for consideration. If another appeals, the prosecution often defends the court's decision. The prosecutor, when acting as the court's delegate, however, has no independent standing to appeal when he differs with the court's own appraisal of the challenged conduct.

The only particularized interest suggested in the present situation is that it will be more difficult for the prosecutor to obtain an indictment if witnesses testify falsely or

remain silent on claim of privilege. Possibly the attorney's conflict in duty may cause him to give improper advice. One or more witnesses may commit perjury, or may remain silent without a valid claim of privilege, or conceivably may make a valid claim when such claim is not in his best interest.

It seems to me that the described type of interest is just too tenuous to give a prosecutor the standing, independently of the court, to initiate a proceeding against an attorney or to appeal from the decision of the court that the claim is unfounded.

Appendix II

In the

United States Court of Appeals

For the Seventh Circuit

No. 78-1520

IN THE MATTER OF
THE SPECIAL FEBRUARY 1977 GRAND JURY
APPEAL OF: UNITED STATES OF AMERICA

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Honorable James B. Parsons, Chief Judge Presiding.

BRIEF FOR THE UNITED STATES

ALEXANDRA M. KWOKA,
Special Attorney,
U. S. Department of Justice.

ARGUMENT

I

THE ORDER OF THE DISTRICT COURT DENYING THE GOVERNMENT'S MOTION TO DISQUALIFY ROBERT L. TUCKER FROM REPRESENTING MULTIPLE WITNESSES BEFORE THE GRAND JURY IS A FINAL ORDER FOR PURPOSES OF APPELLATE JURISDICTION.

The District Court's order denying the government's motion to disqualify Robert L. Tucker from representing multiple witnesses before the Special February 1977 Grand Jury is conclusive as to Mr. Tucker's representation of all of the employees of Finish Line Messenger Service and Mr. Lucky's Messenger Service who may be called to testify before the grand jury and determines claims of right which would be irreparably lost if review were denied. The order, therefore, is a final decision within the meaning of Title 28, United States Code, Section 1291.[7]

In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the threshold question before the Supreme Court was whether the District Court's order refusing to apply a state statute was appealable under 28 U.S.C. § 1291.[8] The Supreme Court concluded that the District

[7] Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).

[8] Concerning 28 U.S.C. §§ 1291 and 1292, the court stated:

> The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete . . . . So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal.
>
> Nor does the statute permit appeals, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge.

337 U.S. at 546.

Court's order was appealable because it was a final disposition of a claimed right which was not an ingredient of the cause of action and did not require consideration with it. The Court reasoned:

> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction.

337 U.S. at 546.

This court has not addressed the issue of whether or not an order granting or denying a motion to disqualify an attorney, in the context of a grand jury proceeding, is appealable. Those circuits which have had the issue presented to them have determined that there is appellate jurisdiction to review an order of the District Court granting a motion to disqualify an attorney.[9] In *Yablonski v. United Mine Workers of America*, 448 F.2d 1175 (D.C. Cir. 1971), *cert. denied* 406 U.S. 906, and 454 F.2d 1036

[9] In re Investigation Before April 1975 Grand Jury, 531 F.2d 600 (D.C. Cir. 1976). Matter of Grand Jury Empaneled January 21, 1975, 536 F.2d 1009 (3d Cir. 1976). In re Investigation Before February 1977 Lynchburg Grand Jury, 563 F.2d 652 (4th Cir. 1977). In re Gopman, 531 F.2d 262 (5th Cir. 1976).

In Matter of Grand Jury Empaneled January 21, 1975 the court stated:

> If anything, the argument for appellate jurisdiction in circumstances such as these is stronger than that in an arguable *Cohen* situation. Here, there is as yet no "case" in the usual sense of the word to which the order may be deemed collateral – no "case" of which there will be eventual, albeit deferred, review.

536 F.2d at 1011, fn. 1.

(D.C. Cir. 1971) the Court of Appeals for the Washington, D. C. Circuit held that it had jurisdiction to review the District Court order denying a motion to disqualify an attorney.

Applying the standard enunciated in *Cohen*, the District Court's order is appealable. The decision of the District Court is final as to Mr. Tucker's claim that he may represent multiple witnesses before the grand jury. Robert L. Tucker, as a result of the court's ruling, may represent each and every employee of Finish Line Messenger Service and Mr. Lucky's Messenger Service who is called to testify before the grand jury regardless of whether they are in a position to testify concerning the conduct of each other. The decision of the District Court is final as to the government's claim that the representation of immunized and non-immunized witnesses before a grand jury is improper. As a result of the court's ruling any attorney in the Northern District of Illinois may represent both immunized and non-immunized witnesses before the grand jury. Further, the decision is not one which will merge in a final judgment, as there is no criminal action pending before the District Court.